

NO. 44715-1-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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TRACY HELM,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,  
et al.,

Respondents.

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**RESPONDENTS' BRIEF**

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## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

In an effort to make state highways safe, the Department of Transportation utilizes an Unstable Slope Management System to (1) identify and assess the risks posed by over 3,000 rock slopes adjacent to state highways across the state, and (2) prioritize the remediation of the risks within limited funding provided by the legislature.

In November 2006, Appellant Tracy Helm hit a rock as she was travelling westbound on I-90 at Snoqualmie Pass. Helm sued the State of Washington, Department of Transportation, and Paula Hammond (collectively referred to as “the Department”), claiming the Department knew that the rock slope adjacent to the freeway at the scene of her accident was dangerous and failed to take measures that would have prevented Helm’s accident. After a five-day trial, a jury decided the Department was not negligent. Helm challenges the trial court’s judgment on two main grounds.

First, Helm claims the trial court’s jury instruction number 27 and a corresponding question on the special verdict form regarding discretionary immunity were not supported by the facts presented at trial. Helm does not argue the instruction misstated the law on discretionary immunity, only that the facts of the case did not call for the instruction. The instruction reflected the trial court’s earlier ruling on summary judgment that the Department had met four of the five tests necessary to

establish a discretionary immunity defense for slope remediation activities, leaving the fifth question—whether a risk/benefit analysis had been done for remediation of this particular slope—for the jury. Helm does not appeal that ruling. Helm concedes that if she had asked the jury for recovery based on the Department’s decision to delay immediate slope remediation, the instruction would have been appropriate. Helm only claims that it was not necessary in this case to instruct the jury on discretionary immunity since she was not arguing for recovery based on the Department’s decision to delay slope remediation. Helm does not explain why she opposed the Department’s two summary judgment motions on this issue if it was not part of her case.

While the Department agrees that Helm focused on theories of liability independent from slope remediation at trial, Helm did also proffer facts and argument from which the jury could have decided that the Department was negligent by delaying slope modification. Accordingly, it was proper for the trial court to instruct the jury on discretionary immunity. Alternatively, if Helm is correct that slope remediation was not part of her case, then any error in so instructing the jury was harmless. The trial court fully instructed the jury on all of the theories of liability Helm now claims she was asserting, including failure to warn, failure to keep the rock ditch clean, and failure to use protective measures. The jury decided whether the Department was negligent for each of these claims in

favor of the Department. This Court should decline to reverse the judgment based on Helm's convoluted argument that the trial court instructed the jury on a theory of liability that Helm was not making, since that instruction could not have impacted the jury's determination of the claims Helm now asserts she was making.

Helm's other main complaint is that her expert witness was not allowed to testify about the utility of measures that she alleges should have been built into the rock slope to prevent rocks from reaching the roadway. However, Helm's expert was not a geologist, and had never been in the position of deciding what measures would be implemented and built into a rock slope. Nor had Helm's expert gone to the scene of the accident to take measurements, analyze the measures in place, or examine the utility of adding more protective measures. Moreover, the trial court did, in fact, permit Helm's expert to opine about the existence and utility of protective measures that are not attached to the rock slope, such as concrete jersey barriers. RP 441, 446-48. Given the lack of qualifications and foundation, the trial court did not abuse its discretion in excluding Helm's expert's testimony of remedial measures that require expertise in geology—measures that are built into a rock slope.

Helm's remaining protests on appeal have to do with evidentiary rulings and jury instructions that Helm claims were not supported by the facts of the case. However, Helm does not establish either abuse of

discretion or prejudice, particularly where the majority of the rulings involve issues that the jury did not even reach in its deliberations. Since the jury found no negligence on the part of the Department, it did not reach questions of comparative fault, superseding cause, or damages.

This Court should affirm the trial court's evidentiary and jury instruction rulings.

## **II. COUNTER-STATEMENT OF THE CASE**

As the prevailing party before the jury, the Department is entitled to have all of the facts and reasonable inferences from the facts viewed in the light most favorable to it. *Wharton v. Dep't of Labor & Indus.*, 61 Wn.2d 286, 287, 378 P.2d 290 (1963).

### **A. Helm Hit A Rock On I-90 Near Snoqualmie Pass**

In the early hours of November 6, 2006, Tracy Helm travelled westbound on I-90 in her motorhome from Spokane towards Snoqualmie Pass. RP 129, 192-93. It was raining very hard along the Pass on that day. RP 248, 298. The Department advised motorists, both through its highway advisory radio and through variable message signs, to reduce speed and use caution. RP 248, 251. There are also three separate four-by-four foot yellow signs warning of rocks as travelers head west towards Snoqualmie Pass between mileposts 66 and 59.<sup>1</sup> RP 294-95.

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<sup>1</sup> Going westbound, the mileposts on I-90 get smaller.

At 9:47 a.m., the State Patrol reported to the Department that there was a rock in the right lane of westbound I-90 between mileposts 58 and 57. RP 254; Trial Exhibit 86. Meanwhile, as Helm approached the snowshed near milepost 58, she saw something “moving in the road,” which ended up being a rock. RP 131. She applied her brakes, but hit the rock with her motorhome. RP 132. Upon hitting the rock, Helm was not able to travel far, but drove the motorhome to the shoulder of the highway. RP 133. From reviewing a photograph of the relevant stretch of highway, Helm estimates that she hit the rock at milepost 58.31, then came to rest on the shoulder around milepost 58.23. RP 135-36; Trial Exhibits 23, 28. Within four minutes of the State Patrol’s report to the Department, maintenance technician Tom Norris reached the scene. RP 255, 257.

When Norris reached the scene, Helm had already hit the rock and pulled over, and there were no rocks in the lanes of travel. RP 305-06. Norris testified that Helm was stopped at milepost 58.2. RP 298. Norris assumed Helm had a flat tire, so he reported to the Department his sighting of the disabled vehicle, and drove past Helm’s vehicle to Hyak to switch out his snowplow for a truck with a signboard that could direct traffic around Helm’s disabled vehicle. RP 304-06. Norris’s recollection is that Helm was within a couple of hundred feet of the entrance to the snowshed. RP 303. Helm was alongside a jersey barrier on the right side. RP 303. When Norris returned, he spoke with Helm about what happened, saw

some rocks on the shoulder, and threw them over the jersey barrier. RP 306-07. Norris then transported Helm and her family to the summit to wait for a tow truck and transportation home. RP 307.

The Department assigns unique identifying numbers to each slope along state highways. The start and end points for different slopes are determined based on several factors, including geologic conditions. RP 401-02. The rock slope between mileposts 58.38 and 58.15 on the westbound side of I-90, where Helm's accident occurred, is known as Slope 1867. RP 401. The first end of Slope 1867 travelling westbound is at milepost 58.38, which is 1,214.4 feet east of the snow shed. The other end of Slope 1867, at milepost 58.15, is located where westbound traffic would first enter the snow shed. RP 402.

**B. The Relevant Slope Was Evaluated By The Department And Scheduled For Remediation Through The Unstable Slope Management System**

As part of its endeavor to make state highways safe, the Department utilizes an Unstable Slope Management System in which it identifies, assesses, prioritizes, and repairs unstable slopes along state highways. RP 366. With the limited funds available to it, the Department assigns points to and prioritizes the repair of 3,200 slopes designated as unstable based on eleven criteria, including accident history, geological problems, traffic, economic factors, and decision sight distance. RP 367-68, 409-10. To even be considered for repair, slopes have to rate at least

350 points as part of the point system ranging from 33 to 891 points. RP 376, 417. A host of considerations govern whether and when the Department will remediate a rock slope, including legislative funding, environmental issues, geological conditions, contracting, needs in other areas, and other logistics. RP 404-05, 410.

In 2005, the Department evaluated Slope 1867 as part of the unstable slope management system, and rated it at 351 points—one point above that necessary to be considered for slope remediation. RP 417; Trial Ex. 88; CP 419a-20. The Department deferred immediate repair of Slope 1867 so that it could remediate other, higher-priority slopes. RP 410-11; CP 317, 419a-20a. Slope 1867 was eventually going to be removed as part of a large construction project called the I-90/Snoqualmie Pass East-Hyak to Keechelus Dam Project, which spanned from mileposts 55 through 61 in both directions, and would involve widening and rerouting the road, and blasting away the rock wall in many places. CP 419a-20. With limited funds, and other, higher priority rock slopes needing attention, it made little sense to partially remediate Slope 1867 right away, only for it to be completely blasted away a few years later in the I-90 project. CP 419a. Instead, there was a great advantage to taxpayers to invest the money in locations with higher risks that would remain indefinitely. CP 420. The decision to place Slope 1867 on the I-90 project delayed remediation of the slope until at least 2014. CP 420a.

**C. Helm Filed Suit Against The Department For Negligence**

Helm filed a lawsuit against the Department claiming the Department negligently failed to properly maintain I-90 near milepost 58 for over ten years, and also negligently failed to warn motorists. CP 4-10. In a portion of her Complaint, Helm alleged that in 1995, “WSDOT noted that rock removal and slope stabilization were needed . . . [but the] work was never done,” and “the necessary upgrades and repairs had not been made.” CP 7, 9.

Based on Helm’s assertion that the Department was liable for its decision to delay remediation of the slope at issue, the Department alleged discretionary immunity as an affirmative defense. CP 18. As explained in summary judgment proceedings and at trial, the repair of the slope at issue in this lawsuit and some 3,000 other slopes was prioritized based on considerations including safety and limited funding. RP 410-11; CP 317. The remediation of this particular slope in question was deferred in light of the fact that a later-scheduled larger construction project would result in removal of the slope. CP 420. The Department also alleged that Helm was comparatively at fault and failed to exercise ordinary care in driving her motorhome. CP 17.

**D. The Trial Court Denied Summary Judgment To The Department On Discretionary Immunity, Reserving A Question Of Fact For The Jury**

Based on Helm's allegation that the Department was negligent in not making "the necessary upgrades and repairs" to Slope 1867, the Department filed a Motion for Summary Judgment asserting discretionary immunity with respect to that claim. CP 9, 272-87, 436-45. Helm opposed by arguing, in part, there was a question of fact as to whether the Department balanced the risks and advantages of delaying remediation prior to Helm's accident in 2006. CP 343. Helm also argued the Department should not be able to assert "poverty" as a defense to its decision to defer slope remediation. CP 646-52. At no time in her summary judgment pleadings did Helm repudiate her claim that the Department's failure to remediate the slope was negligent.

The trial court ultimately denied summary judgment because there were "mixed questions of fact and law and insufficient information in the summary judgment submissions" for resolving whether the Department performed a cost-benefit analysis supporting delaying remediation of Slope 1867 in particular. CP 27. However, the trial court did make several findings that are not challenged in this appeal, including:

- "[T]he system for managing slopes along roadways involves a basic governmental policy of the Department of Transportation;"

- “[T]he prioritization was essential to determining how to mitigate dangers with limited resources;”
- “[T]he prioritization involves the exercise of policy-level judgment;” and
- “[T]he agency had authority to make this type of decision.”

CP 27. Thus, the only question remaining for trial on discretionary immunity was whether the Department balanced the risks and benefits of delaying remediation of Slope 1867. CP 27; *see also Avellaneda v. State*, 167 Wn. App. 474, 480, 273 P.3d 477 (2012) (reciting test for discretionary immunity to include a conscious balancing of the risks and benefits); *King v. City of Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974) (“[T]o be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place.”).

**E. The Trial Court Precluded Plaintiff’s Expert, Who Is Not A Geologist, From Opining On Geological Issues**

Several weeks before trial, the Department moved the trial court in limine for an order excluding or limiting the testimony of Helm’s expert, Henry Borden. CP 480-82. The Department argued that, while Borden had experience as a civil engineer in highway design, he had no geological education, licensure, or background. CP 481. Additionally, Borden had not visited the scene of the accident nor taken any measurements, so he could not establish an adequate foundation for the opinions he wanted to give that required a knowledge and understanding of the geologic

condition of the slope. CP 482. Rather, Borden “drove by” the slope when he was in the area on other business. CP 474. Therefore, the Department argued, Borden should not be permitted to testify about management of rock slopes—particularly the slope in question, seeing as how he had an inadequate factual foundation for his opinions and was not qualified. CP 481-82.

At the hearing on the Department’s motions in limine on February 22, 2013, the trial court initially deferred ruling on the Department’s motion to exclude Borden until a qualification hearing could be heard outside the presence of the jury. RP 4-5. Despite being on notice well before trial that her expert might be excluded or severely limited from testifying, Helm chose not to seek an alternate expert who had the requisite expertise, and who could obtain the necessary factual foundation for the opinions she wanted to offer.

On March 11, 2013, the day before trial commenced, the trial court held a qualification hearing regarding Borden. RP 14-37. At the close of Helm’s offer of proof, the trial court indicated it would sustain an objection to testimony that delved into geological expertise, such as the behavior of rocks and what rain and moisture do to rock slopes. RP 44. The trial court ultimately entered an order that Borden could not testify as to slope remediation, geological formation of the slope, effect of rain on the slope, or geology in general. CP 92-94.

Helm told the trial court that she did not object to the bulk of the order, only to the definition of “slope remediation” to include interim protective measures such as rock screens and rock fences. RP 94, 219. The Department responded that, while it understood the trial court would allow Borden to testify about concrete barriers unattached to the slope, opinions regarding rock fences, rock mesh, or rock scaling would delve into the practice of engineering geology, as they actually are built into the rock slope face. RP 95, 220. The trial court expressed doubt over whether Borden was qualified to talk about protective measures built into the slope, initially reserving ruling until further testimony. RP 95-96, 220-23. Ultimately, the trial court ruled Borden was not qualified to speak about cable nets or rock fences attached to the slope, as that was within the province of a geologist. RP 429-31; CP 92-94.

The trial court’s ultimate ruling was informed by the testimony of Tom Badger, the Chief Engineering Geologist for the Department, who was called by Helm and testified that geologists like himself make the judgment calls for what protective devices to use and where to put them. RP 394; CP 585. For example, Badger testified that cable nets are not necessarily effective on every slope. RP 409. Badger further talked about the process for deciding what to fix on a slope, and noted that “you have to understand the geologic conditions that [are] generating the slope problem.” RP 404-05. Ditches are built based on cut slope designs and

ditch recommendations from geologists. RP 419. Thus, particularly in light of Badger's testimony, the trial court concluded that Borden lacked sufficient expertise to opine on appropriate protective measures attached to a rock slope. RP 429-31; CP 92-94.

**F. After A Five-Day Trial, The Jury Returned A Defense Verdict**

In addition to a day of pretrial matters, the parties took five days to present their cases to the jury. RP 1-742. The jury began deliberating and reached a verdict on the fifth day. RP 734, 736-37. The jury answered the first two questions on the special verdict form. CP 133. First, the jury decided that the Department had balanced the risks and advantages in delaying remediation of Slope 1867. CP 133. Second, the jury concluded that, that apart from its decisions regarding slope remediation, the Department was not negligent based on all of Helm's other theories of negligence, including failure to warn of the dangerous condition, failure to properly maintain the roadway and the ditch, and failure to implement protective measures such as a concrete jersey barrier. CP 133.

**III. STATEMENT OF THE ISSUES**

1. Where Helm agrees that discretionary immunity would be an appropriate defense to a claim that the Department was negligent in delaying remediation of Slope 1867, was the trial court's instruction on discretionary immunity proper and not prejudicial?

2. Did the trial court properly exercise its discretion to limit the testimony of Helm's expert, who was not a geologist and had not visited the scene of the accident, from testifying about matters dependent on geological knowledge and experience?

3. Did the trial court properly exercise its discretion to exclude a State Patrol document which contained several levels of hearsay, was not self-explanatory, and which no witness at trial could explain?

4. Should this Court affirm the trial court's other discretionary decisions, where Helm failed to establish the trial judge abused his discretion or that the trial court's rulings affected the outcome of the trial?

#### **IV. ARGUMENT IN RESPONSE**

##### **A. The Trial Court Did Not Abuse Its Discretion In Instructing The Jury On Discretionary Immunity**

Helm makes two assignments of error to the trial court's instruction number 27 and the portion of the special verdict form discussing discretionary immunity.<sup>2</sup> Brief of Appellant (Br. of Appellant)

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<sup>2</sup> Helm also complains about the court's instruction number 13, which merely summarized the parties' respective claims, including the Department's affirmative defenses, and instructed the jury that the summary was not evidence. However, a "jury instruction which merely summarizes a plaintiff's claims is not prejudicial where the jury is also instructed to consider only those claims supported by the evidence." *McLaughlin v. Cooke*, 112 Wn.2d 829, 839, 774 P.2d 1171, 1176 (1989). Moreover, Helm does not attach the instruction nor quote it as required by RAP 10.4(c), so the Court need not consider Helm's arguments in that regard.

at 3, 19. Helm does not argue the trial court's instruction misstates the law on discretionary immunity, but rather that it should not have been given because Helm never complained that the Department negligently delayed slope remediation. Br. of Appellant at 19-23. Because Helm only argues instruction number 27 was not supported by the evidence, the trial court's decision should be overturned only if the trial court abused its discretion in giving jury instruction number 27 and the instruction prejudiced the outcome of the trial. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286, 288-89 (2009) (citing *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)); *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). "When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Specifically as to the Department's decision to delay mitigation of Slope 1867, which would have required major construction,<sup>3</sup> and consistent with the trial court's earlier findings on summary

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Helm also does not attach copies of the other instructions she is appealing as required by RAP 10.4(c). For the Court's convenience, the Department is attaching copies of instruction 27 and special verdict form at issue as Appendices A and B.

<sup>3</sup> See, e.g., RP 366-67, 383, 404-06, 412-13 (noting highway would have to be moved or slope excavated to bring catchment ditch up to standards).

judgment,<sup>4</sup> the trial court instructed the jury that “[t]he system for managing slopes along roadways involves a basic governmental policy of the Department,” and that the State is “immune from liability for decisions in which it is determining basic governmental policy.” CP 126. Based on the outstanding question of fact, the jury was asked to answer whether the “evidence establish[ed] that the Department of Transportation balanced the risks and advantages of delaying remediation of Slope 1867?” CP 133. The jury was further asked, “[a]part from its decisions regarding slope remediation, was the State of Washington negligent in this case?” CP 133. Thus, the jury was required to decide whether the Department was negligent regardless of whether it found the Department weighed the costs and benefits of delaying the slope remediation project.

As further explained below, because the facts and arguments proffered by Helm throughout this case suggested liability based on the Department’s failure to mitigate the slope, the discretionary immunity instruction was appropriate. But, if Helm is correct that she never advocated for slope remediation as part of the Department’s negligence,

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<sup>4</sup> The trial court decided on summary judgment that: (1) managing slopes along roadways involves basic governmental policy of the Department, (2) prioritization was essential to determining how to mitigate dangers with limited resources, (3) such prioritization involved the exercise of policy-level judgment, and (4) the Department had authority to make that kind of decision. CP 27. The trial court found that there were questions of fact as to whether the Department had weighed the risks and benefits associated with the remediation of the specific slope at issue, and thus reserved that issue for trial and declined to grant summary judgment. CP 26-27. Helm did not appeal nor assign error to this decision.

then any error in so instructing the jury was harmless. In any event, Helm was able to argue her theory of the case.

**1. Helm Argued And Introduced Facts Which Encouraged The Jury To Decide The Department's Failure To Immediately Remediate Slope 1867 Was Negligent; Therefore, The Discretionary Immunity Instruction And Verdict Questions Were Appropriate**

It is important to note that Helm does not disagree that discretionary immunity is an affirmative defense that the Department would be entitled to assert regarding its decision to delay the remediation of Slope 1867 as part of its unstable slope management prioritization system. Br. of Appellant at 22 (citing *Avellaneda v. State*, 167 Wn. App. 474, 273 P.3d 477 (2012), and acknowledging “WSDOT’s decision to defer installation of a median barrier [which was covered by discretionary immunity in *Avellaneda*] is similar to WSDOT’s decision to defer slope remediation in the instant case”).<sup>5</sup> Rather, Helm argues that because she never argued the Department’s failure to remediate Slope 1867 was negligent, it was error to instruct the jury that the Department’s decisions regarding slope remediation were subject to a discretionary immunity defense. Br. of Appellant at 22 (“Unlike the plaintiff in *Avellaneda*, Plaintiff in the instant case did not allege that the deferment was negligent.”).

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<sup>5</sup> See also RP 26-27 (finding Unstable Slope Management System meets all elements of discretionary immunity, but question of fact as to application of the policy to delay remediation of Slope 1867).

Helm's underlying premise—that she never argued liability for the Department's failure to remediate the slope—is contradicted several times in the record.

First, beginning with Helm's Amended Complaint, Helm alleged:

WSDOT noted that rock removal and slope stabilization were needed at the stretch of I-90 from milepost 58 to milepost 66 and it was to be accomplished by construction of rock dowels, bolts, cable net slope protection, erosion control, debris removal, scaling, pavement marking, and other work.

...

WSDOT failed to take reasonable measures to maintain a safe roadway for travelers in the area of mile post 58, Snoqualmie Pass. Problems and safety concerns regarding this short stretch of I-90 had been exhaustively identified over ten years earlier and yet, the necessary upgrades and repairs had not been made.

CP 7 ¶¶ 19, 34. Although the Department pled discretionary immunity as its first affirmative defense, Helm never sought to strike it. CP 17. When the Department sought summary judgment under discretionary immunity, Helm did not argue the narrow scope of liability that she is now arguing. CP 272-87. Rather, Helm argued that there was a question of fact as to, (1) who made the decision to defer remediation, or (2) whether the cost-benefit balancing had been done prior to her accident. CP 340-47. After the trial court made findings to support the discretionary immunity defense, but denied summary judgment on the basis that there was question of fact as to whether a cost-benefit analysis had been done regarding Slope 1867, the Department sought summary judgment again on

discretionary immunity, including evidence as to the cost-benefit analysis regarding Slope 1867. CP 26-27, 419-45. Helm again opposed summary judgment on this issue and asserted that she “disput[ed]” the Department’s argument that “the delay in performing slope remediation in the area of our accident was appropriately decided.” CP 641. Again, Helm did not argue that her theory of liability did not encompass the delay of slope remediation; rather, she argued that the State should not be able to assert “poverty” as a defense to its decision to defer slope remediation, and further that there were questions of fact as to the State’s cost-benefit analysis regarding Slope 1867. CP 646-52.

Throughout the trial, Helm argued and solicited testimony suggesting the Department was responsible for not addressing the inherent dangers of the slope through remediation. In her opening, Helm introduced the jury to her theory of the case, including that Slope 1867 was a dangerous slope that the Department knew about and failed to correct. RP 106-07 (“I think we can all agree that if the Department of Transportation is responsible for keeping those highways safe, if they know of a hazard, they have a duty to either correct that hazard or warn us of it . . . [otherwise] they’re responsible for the harm that that failure causes.”); RP 110 (“[L]ooking at the pass where this particular crash occurred, I-90, you’ll hear evidence that has a number of what are called -- designated by the state geologists, State of Washington, as high-risk

slopes. The particular area where she was -- her vehicle was damaged is one of those high-risk slopes.”).

Helm also solicited testimony from the Department’s Chief Engineering Geologist, Tom Badger, that the rock fall ditch on Slope 1867 did not meet design standards, was too narrow, and had not been modified since the late 1950s. RP 395. In response to the Department’s question as to how to manage the risk of Slope 1867 to motorists based on the inadequate size of the catchment ditch, Mr. Badger testified that the Department would have to move the highway or excavate the slope. RP 412-13. That, Mr. Badger testified, was subject to the State’s unstable slope management system. RP 412-13. On redirect, Helm again solicited testimony that the ditch had not been modified to conform to current design standards since its creation sixty plus years earlier. RP 420.

Again in closing argument, Helm argued for a broad theory of liability:

- RP 701-02: “We also indicated that if the state knew or should have known about an unsafe condition that they had an obligation to do something about it. And if they failed to take care of or correct that unsafe condition or hazard, then they’re responsible for the harm that occurred . . . . [Instruction No. 25] says that if you must find the state had notice of the condition, and that it had a reasonable opportunity to correct the condition in order to find them responsible for the harm that the failure to correct that condition caused.”
- RP 705: “You have a negligence instruction . . . . Should the state, as a reasonably careful person, have taken some corrective actions to prevent rocks -- [not] that rock in that particular day, but any

rocks from reaching the roadway to make that particular slope, 1867, and the highway below it, which is where we're concerned, safe for motorists to use at that time."

- RP 706: "So we have an expectation or right to be able to travel on our freeways and not have an expectation of impending death, disaster or hazards or something out on the highway."
- RP 706: "What knowledge did the state have? Well, look at the date of it. It's March 17, 2004. It's our slope . . . . That says rockfall and debris impacted the westbound lanes near milepost 58.2 . . . . And it's done it several times in 2004 . . . ."
- RP 706-07: "So they talked about it and what they're going to do about it, and then in their judgment while the slope posed significant rockfall hazard to the westbound lanes, both of them, that Tracy was using two years later, they didn't think it created a visibly worse condition."
- RP 707-08: "Again, does that provide notice to the state that there's a problem in the westbound lanes of I-90?"
- RP 710: "They knew in 2004. So you take -- take that information that they knew in 2004, couple it with your Instruction No. 25, and take a look and determine whether or not you feel the facts, 2004, 2005, of their notice, doesn't meet the requirements or the rule of the law that was expressed in Instruction No. 25 to you."
- RP 728: "First of all, we would [not] be standing here, I wouldn't be representing Tracy Helm, and Tracy wouldn't have brought this case before you if the issue in this case was the four minutes of notice about the rock that came down on the roadway. It was when Ms. Helm found out that they knew about this issue in 2004, knew about the problem in 2005, had coded it at the worse highest level that you could code it at, any one, as far as a risk factor for that particular stretch of the highway, that's when she felt the state had notice. Geez, they should have done something about it and I wouldn't have had to go through this back surgery and I wouldn't have suffered my herniated disk."

- RP 729: “That’s the question we’re asking you to look at, the facts in this particular case. Could this accident have been prevented? Could they have done something between 2004 and 2006 that would have prevented this accident?”

Although Helm told the trial judge that she was not arguing the Department’s delay of slope remediation constituted negligence, she never conceded that theory of liability to the jury. To the contrary, as noted above, Helm planted the seed in the jury’s minds several times. Further, the jury was never instructed that the Department’s failure to remediate Slope 1867 could not be a theory of negligence. Accordingly, without an instruction and verdict that the slope remediation was subject to discretionary immunity (if the jury determined that the Department weighed the costs and benefits associated with delaying remediation), the jury could have decided that the Department was negligent in delaying remediation of the slope, particularly in light of the multiple times that Helm introduced evidence and argued how dangerous the slope was.

Helm does not argue the discretionary immunity instruction misstates the law, only that it should not have been given under the facts presented to the jury. Given the facts and arguments presented by Helm regarding the dangerousness of Slope 1867, the trial court properly applied its discretion to instruct the jury on discretionary immunity specific to slope remediation.

**2. Any Alleged Errors Were Harmless Because Helm Was Able To Argue The Theories Of Her Case**

Even if, as Helm argues, the instructions and questions on the special verdict form regarding discretionary immunity were inappropriate because she was not seeking recovery for negligent delay in slope remediation, Helm was not prejudiced because she was still able to argue all of her theories of the case, and the claimed errors did not impact the outcome of the trial. In other words, if Helm is correct that she never argued, implied, or introduced facts to the jury suggesting the Department's delay in remediating the slope was negligent, then the trial court's instruction to the jury on discretionary immunity—which was specific to a claim for failure to remediate the slope—was harmless. If Helm's only theories of liability were negligent failure to warn, failure to keep the ditch clean, and failure to use other devices to prevent rocks from reaching the roadway, Helm had the full opportunity to argue all of those theories to the jury, and the jury still had to decide if the Department was negligent "apart from its decisions regarding slope remediation." CP 133.

Jury instructions must be considered in their entirety. *Kappelman*, 167 Wn.2d at 6 (citing *Brown v. Spokane Cnty. Fire Prot.*, 100 Wn.2d 188, 194, 668 P.2d 571 (1983)). Reversal is appropriate only where prejudice is shown. *Id.* Instructions are sufficient if "they allow the

parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995) An erroneous jury instruction is not grounds for reversal unless it affects or presumptively affects the outcome of the trial. *Thomas*, 99 Wn.2d at 104.

If Helm is correct that there were no facts or argument suggesting negligence of the Department in delaying slope remediation, the giving of the instruction was harmless, as the jury still had to decide if the Department was negligent “apart from its decisions regarding slope remediation.” CP 133. Further, there were separate instructions on the State’s duty to maintain its highways, correct unsafe conditions, and on negligence that Helm does not claim were erroneous,<sup>6</sup> at least one of which Helm relied upon heavily in her closing. CP 113, 123, 124; RP 702, 710-11, 729-30.

Helm argues that the instruction and the verdict “misled jurors to believe the law in this case was that the State was immune from liability for activities involving slopes.” Br. of Appellant at 20. But neither the instruction nor the special verdict was so broad. Rather, Instruction Number 27 specifically limits itself to the “system for *managing slopes* along roadways,” and the applicable verdict question even further limits itself to “*delaying remediation* of Slope 1867” and “decisions regarding

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<sup>6</sup> Helm assigned error to Instruction Number 15, but only as to its inclusion of contributory negligence. Br. of Appellant at 4; CP 113.

*slope remediation.*” CP 126, 133 (emphases added). To the extent that Helm is complaining that the trial court did not instruct the jury on the definition of slope remediation, she is precluded from arguing this because she never requested or proposed an instruction defining slope remediation. *Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 447, 663 P.2d 113 (1983). Helm’s concerns are further belied by the trial testimony of Tom Badger, who defined “remediating” as “fixing slopes.” RP 409. The Department did not argue to the jury that actions such as keeping the ditch clean or building a concrete barrier on the roadway were “slope remediation” activities subject to the affirmative defense, and the trial court did not so instruct the jury. RP 721-28.

Moreover, Helm argued throughout her closing, without objection from the Department, that the Department failed to keep the ditch clean and should have extended the concrete barrier. RP 708, 710 (“If the ditch had been properly maintained, rocks -- those -- they’re not huge, but rocks the size of basketballs and footballs shouldn’t have been able to reach the road.”); RP 729, 733 (“All they had to do was take that concrete barrier and extend it down this way a little bit, . . . and we wouldn’t have this accident.”). Helm further argued that the jury should find negligence under question 2 regardless of its answer to the question regarding discretionary immunity. RP 719 (“So whichever way you answer number 1, one of the next two would be “yes” if you believe the state has violated

the rules in this case.”). Therefore, irrespective of whether the trial court abused its discretion, Helm cannot show prejudice. The trial court’s instructions and the special verdict form fairly enabled Helm to argue her theory of the case.

In sum, based on Helm’s contentions and introduction of evidence throughout this case—from her complaint through trial—the trial court did not error in instructing the jury on discretionary immunity and asking the jury to decide whether the Department balanced the risks and advantages of delaying remediation of Slope 1867. But, even if the instructions were an abuse of discretion or otherwise erroneous, Helm did not establish prejudice because she was able to argue her theories of the case and, regardless, the jury had to decide whether the Department was negligent “apart from its decisions regarding slope remediation.”

**B. The Trial Court Properly Exercised Discretion To Limit Borden’s Testimony, As He Is Not A Geologist And Did Not Visit The Scene Of The Accident**

Helm next assigns error to the trial court’s discretionary decision to limit her expert, Henry Borden, a former highway safety engineer, from testifying about mechanisms built into the rock slope that she claims should have been used to contain the rocks on Slope 1867. Br. of Appellant at 3-4, 23-31. “Trial courts retain broad discretion in determining whether an expert is qualified and will be reversed only for manifest abuse.” *Harris*, 99 Wn.2d at 450. “An abuse of discretion

occurs when the trial court's decision is based on untenable grounds or untenable reasons." *Kappelman*, 167 Wn.2d at 6 (citing *State v. Athan*, 160 Wn.2d 354, 376, 158 P.3d 27 (2007)).

The trial court's decision to limit Borden should be affirmed for at least three reasons. First, as Mr. Borden is not a geologist and had no experience with determining or implementing protective measures built into a rock slope, he was not qualified to testify to such measures, which are dependent on the unique geographical features of each slope. Second, Borden lacked adequate foundation for his opinions, since he never even visited the scene of the accident to take measurements or develop his assessments as to risk and protective measures for the actual slope in question. Third, Helm did not show prejudice to her case. The trial court was well within its discretion to limit Borden's testimony to interim protective devices not built into the rock slope.

**1. Helm Misstates The Court's Ruling; Borden Was Permitted To Testify To Protective Devices Not Attached To The Rock Slope**

As a preliminary matter, Helm argues the trial court impermissibly ruled Borden was "not qualified to testify regarding interim solutions pending the deferred remediation." Br. of Appellant at 23. But, that was not the trial court's ruling. Rather, the trial court concluded that Borden did not have the expertise to testify as to slope remediation and protective devices that are built into the rock slope, such as cable netting. CP 92-94;

RP 429-32. The trial court made clear several times that protective devices unattached to the rock slope, such as concrete jersey barriers and rock fences (if they exist unattached to the rock slope), were not within the scope of its order, and Borden would be allowed to testify as to their availability. RP 428-29, 431.<sup>7</sup>

Borden testified that his “major opinion” in this case is that a concrete barrier should have separated the lanes of travel from the rock slope. RP 28-29. Borden was allowed to testify as to this opinion to the jury. RP 441, 446-48. Borden specifically testified, without objection, that a concrete barrier on the roadway should have been used to protect I-90 at Slope 1867 from rock fall. RP 448. Borden was also allowed to testify about the availability of other protective devices such as a rock fence. RP 438-39.

The quotation Helm uses to suggest the trial court ruled Borden could not testify to the use of *any* protective devices is misleading, and omits important context. Br. of Appellant at 26 (quoting RP 447-48). First, prior to that colloquy, Borden had already been permitted to opine that protective devices such as concrete barriers could have been implemented to protect travelers from Slope 1867. RP 446. Second, after the colloquy quoted by Helm, Borden again specifically opined, without

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<sup>7</sup> The only part of the trial court’s order that Helm objected to at trial and complains of now is the inclusion of rock screens, rock mesh, and rock fences in the area that Borden was unqualified to testify to. RP 94 (“No objection to those, but you look above, Your Honor, my objection went to the part of the temporary fix.”); RP 219.

objection, that the use of a concrete barrier to protect I-90 at Slope 1867 “should have been done.” RP 448. Thus, regardless of whether he should have been allowed to, Borden did, in fact, provide his opinion on the utility of a concrete barrier.<sup>8</sup>

Borden was permitted to testify about the availability and utility of protective devices unattached to the rock slope. However, Helm did not have a qualified witness with an adequate foundation to opine regarding devices built into the rock slope. Helm was limited only in that narrow respect.

## **2. Borden Was Not Qualified To Testify To Protective Devices Dependent On Geological Features**

The trial court appropriately determined that Borden had neither the education nor the experience to testify as to his opinion on the appropriate protective devices that should have been implemented by building them into Slope 1867.

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<sup>8</sup> Helm also appears to complain about the trial court’s ruling in response to her counsel’s questioning to Borden about whether the current measures were “adequate” to insure motorist safety on November 6, 2006. The trial court sustained the Department’s objection that degree of risk presented by a rock slope is within the purview of a geologist. RP 452. This ruling was also within the trial court’s discretion, particularly considering Borden’s acknowledgement he had no knowledge of the conditions of the slope or the roadway on the date of the accident. RP 454-55, 458. Additionally, Helm does not assign error to this ruling. Br. of Appellant at 3-4. And, again, in any event, Borden was later permitted to opine that the rockfall ditch was at least partially full, and that the measures in place were “unsafe.” RP 457-58.

**a. Determining Protective Measures For Rock Slopes Is Highly Specialized**

In 2000, the legislature determined it was in the “public interest to regulate the practice of geology to safeguard life, health, and property and to promote public welfare.” Laws of 2000, ch. 353, § 1 (codified at RCW 18.220.005). As such, it is unlawful for any person to practice geology without a license. RCW 18.220.020(1).<sup>9</sup>

“Geology” is defined as “the science that includes: Treatment of the earth and its origin and history, in general; the investigation of the earth’s constituent rocks, minerals, solids, fluids . . . .” RCW 18.220.010(7). “Engineering geology” means “a specialty of geology affecting the planning, design, operation, and maintenance of engineering works and other human activities where geological factors and conditions impact the public welfare or the safeguarding of life, health, property, and the environment.” RCW 18.220.010(5). The practice of geology is broadly defined to include “any branch of the profession of geology,” and holding oneself out as “able to perform or does perform any geological services or work recognized by the board as the practice of geology for others.” RCW 18.220.020(2). It is further defined to include “performance of geological service or work including

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<sup>9</sup> The Department acknowledges that testimony is specifically excluded from the definition of the practice of geology that requires a license. RCW 18.220.190(8). But, the Department’s point is that Borden could not have acquired the experience he needed to be qualified to testify to geological features since he was never licensed as a geologist.

but not limited to collection of geological data, consultation, investigation, evaluation, interpreting, planning, geological mapping, or inspection relating to a service or work that applies to geology.” RCW 18.220.020(2).

Tom Badger, the Chief Engineering Geologist for the Department, was called by both Helm and the Department as a witness. RP 363. Badger manages the engineering geology section within the geotechnical office at the Department, which employs several engineering geologists who perform design work, construction support, and emergency response for earth work, landslides, and rockfalls. RP 365. In 2004 and 2005, Badger evaluated the slopes along the I-90 corridor over Snoqualmie Pass as part of the unstable slope management system, in which the Department identifies, assesses, rates, prioritizes, and performs the repairs of unstable slopes along state highways. RP 366. Badger testified that experts like him (i.e., geologists) determine whether a particular protective device would be effective or appropriate to implement on a given slope. RP 394-95. Determining the appropriateness of protective devices is very site-specific. RP 387. It depends on many factors such as the size and volume of rockfall that occurs, how irregular the slope is, how effective the device would be for the specific conditions at issue, and budgetary constraints. RP 388, 409.

**b. Borden Is Not A Geologist And Has No Experience Determining Appropriate Protective Devices To Apply To Rock Slopes**

Henry Borden is not a geologist. RP 454. He has no formal education in geology. RP 454. While Borden has experience with highway safety design, and stated he had testified in cases “involving rocks or debris” hitting the roadway, Borden does not have experience in evaluating and deciding the appropriate protective measure to be applied to a rock slope to protect a highway. RP 20. Rather, he vaguely claims he has experience working on highways that went through “[s]oil cuts and some rock cuts too,” and has “on occasion” worked “with protective devices.” RP 436-37. Occasionally working “with” highways that go through rock cuts, and even “with” protective devices is not the same as evaluating and determining appropriate protective measures to be applied to rock slope faces to prevent rocks from leaving the slope.

The only geologist who testified in this case, Tom Badger, testified that trained and licensed geologists make the determination as to what protective measures to implement on a specific rock slope. RP 394-95. As Borden is not a geologist, nor did he have any experience in deciding appropriate protective measures to be applied on a rock slope, the trial court appropriately decided that Borden did not have the expertise to opine about such protective measures. RP 429-32.

All but one of the cases cited by Helm on this issue are cases in which the Court of Appeals or the Supreme Court affirmed a trial court's discretionary decision to allow expert testimony. They generally provide that the trial court has broad discretion in denying or allowing expert testimony, and that such decisions will only be overturned for manifest abuse of discretion. *Palmer v. Massey-Ferguson, Inc.*, 3 Wn. App. 508, 511, 476 P.2d 713 (1970); *State v. Smith*, 88 Wn.2d 639, 647, 564 P.2d 1154 (1977), *overruled on other grounds*; *State v. Jones*, 99 Wn.2d 735, 664 P.2d 1216 (1983); *Hall v. Sacred Health Med. Ctr.*, 100 Wn. App. 53, 60, 995 P.2d 621 (2000); *State v. Weaville*, 162 Wn. App. 801, 824, 256 P.3d 426 (2011); *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Such cases have little value in determining the question presented in Helm's appeal—whether the trial court abused its discretion in limiting expert testimony.

In the one case cited by Helm in which a trial court's decision to exclude testimony was reversed, the trial court had completely disqualified a reconstructive plastic surgeon from testifying on summary judgment as to the standard of care for treatment that was provided by an orthopedic surgeon, the appropriateness of the surgeon's treatment, and causation. *Seybold v. Neu*, 105 Wn. App. 666, 669-70, 19 P.3d 1068 (2001). However, in *Seybold*, the record reflected that the scope of work at issue was routinely performed by plastic surgeons, and the relevant specialty

was not orthopedics, but surgical treatment of cutaneous malignancies and bone grafting. *Seybold*, 105 Wn. App. at 669-70. Since the reconstructive plastic surgeon had “extensive experience” in both of those areas, the Court of Appeals concluded that the trial court had abused its discretion in excluding the expert solely because he was not an orthopedic surgeon. *Id.* at 680-81.

Here, the relevant specialty is the containment of rocks on the actual rock slopes. The testimony and the law establish that this is within the purview of geologists such as Tom Badger. Moreover, regardless of Borden’s lack of licensure or education in geology, the trial court reasonably determined from Helm’s offer of proof, Borden’s deposition, and Borden’s testimony that Borden did not have experience in deciding how to actually contain rocks on rock slopes. RP 14-39, 432-58; CP 475 (“Most of the slope work I’ve done has been soil -- in sliding soil slopes. And I can’t recall a rock slope that I worked on myself at the DOT.”).

### **3. Borden’s Opinions Were Properly Excluded Because They Were Speculative**

An independent basis for affirming the limitation of Borden’s testimony is that his opinions were nothing more than speculation. “A trial court’s ruling on the admissibility of evidence will not be disturbed on appeal if it is sustainable on alternative grounds.” *Thomas*, 99 Wn.2d at 104. Borden admitted that he did not visit the site of

the accident for purposes of this case. CP 474; RP 30. Rather, he “drove by it” when he was in the area for another case. CP 474. He did not take any photos nor have any surveys performed of the area. CP 474; RP 30. He did not perform a quantitative analysis to support his conclusion (if he had so concluded) that additional protective measures would have prevented Helm’s accident.

Borden’s opinion as to the appropriateness of a concrete barrier was based on his understanding that the Department’s design manual allowed for the use of concrete barriers in conjunction with containment ditches. RP 26-27. However, even with the concrete barrier, Borden did not express his opinion that its existence would have prevented the rock that Helm hit from reaching the roadway. Borden also did not testify during Helm’s offer of proof whether other measures, such as a guardrail with a rock fence, would have been effective in preventing the rock that Helm hit from reaching the roadway. RP 29. Even as to his broad opinion that more protective devices would have generally prevented more rocks from reaching the roadway, Borden provided no basis other than speculation—he did not explain why evidence, science, or physics supported his conclusions. RP 14-39, 432-58; CP 475. And, as noted, Borden did not even visit the scene of the accident for the purposes of this litigation. CP 474; RP 30.

Borden's testimony was properly limited because it was speculative. As the Court of Appeals has stated multiple times, "[i]t is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835, 839 (2001) (quoting *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991), *review denied*, 118 Wn.2d 1010, 824 P.2d 490 (1992)). "In addition, when ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert." *Miller*, 109 Wn. App. at 148 (quoting *Davidson v. Mun. of Metro. Seattle*, 43 Wn. App. 569, 571-72, 719 P.2d 569, *review denied*, 106 Wn.2d 1009 (1986)). Borden's testimony regarding protective measures was speculative and would not have been helpful to the jury, and, therefore, was properly limited under ER 702, regardless of Borden's qualifications. Moreover, Helm did not show prejudice. *Thomas*, 99 Wn.2d at 104 ("[E]rror without prejudice is not grounds for reversal.").

This Court should affirm the trial court's discretionary decision to limit Borden's testimony to protective devices unattached to the slope.

**C. The Trial Court Appropriately Excluded Trial Exhibit 15 As Hearsay, Irrelevant, And Unduly Prejudicial**

Helm's next contention is that the trial court abused its discretion by not admitting Trial Exhibit 15, a Computer-Aided Dispatch Log

generated by the Washington State Patrol, which indicated that a small rockslide occurred the day before Helm's accident on I-90 somewhere near milepost 58. However, Helm did not call a witness from the Washington State Patrol to explain the record, nor did she establish that the rockslide reported in the log was in reference to the same slope involved in Helm's accident. The trial court properly concluded that the danger of unfair prejudice and confusion in admitting the log substantially outweighed any "marginal" or "slight" relevance. RP 63-65, 276.<sup>10</sup> Moreover, as the trial court noted, the exhibit was also inadmissible because it contained multiple hearsay statements. RP 271.

"A trial court's decision to exclude evidence will be reversed only where it has abused its discretion." *Kappelman*, 167 Wn.2d at 6 (citing *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007)). Additionally, "[a] trial court's ruling on the admissibility of evidence will not be disturbed on appeal if it is sustainable on alternative grounds." *Thomas*, 99 Wn.2d at 104. Only relevant evidence is admissible. ER 402. Pursuant to Evidence Rule 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

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<sup>10</sup> Helm cites only to discussion occurring during trial regarding a different exhibit, but the trial court had already made the decision to exclude all references to a rockslide, including Trial Exhibit 15, the day before prior to trial. RP 62-65; CP 85-86. Helm does not take proper exception to this earlier ruling.

cumulative evidence.” Even where an initial document satisfies an exception to the rule against hearsay, it may still be excluded where it contains hearsay statements that do not satisfy an exception. ER 802, 805; *In re Detention of Coe*, 175 Wn.2d 482, 505 ¶ 53, 286 P.3d 29 (2012).

The relevance Helm offers for admitting the log is to show that the Department had notice with respect to its duty to either warn motorists of or take other action to protect motorists from the danger of rockslides.<sup>11</sup> Br. of Appellant at 33. However, as the trial court noted, “to assume that a rockfall in one location creates a likelihood of a rockfall in another location, . . . a geologist might be able to testify to that, but the jury can’t make that conclusion.” RP 276. Helm did not offer evidence that a rockslide in one area creates a likelihood of further slides in the same area or nearby areas, nor that the earlier rockslide occurred at precisely the same location as where Helm claimed she hit the rock (milepost 58.2).

Additionally, Trial Exhibit 15 posed a substantial potential for unfair prejudice, confusion of the issues, and misleading the jury. First, Helm did not offer the testimony of any individual with direct knowledge of the circumstances of the earlier rock slide or the log referencing it, leading both parties, the trial court, and the jury, if permitted, to speculate

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<sup>11</sup> Helm argues the prior rockfall is “probative of the issue of notice to the State and the issue of whether the State had a duty to better protect the roadway and/or a duty to warn motorists.” Br. of Appellant at 33. Helm’s arguments on duty are also premised on notice. *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 475, 951 P.2d 749 (1998) (scope of duty defined by foreseeability).

as to what different notations and shorthand on the log meant. Second, the log did not indicate that the earlier rockslide occurred at the same location where Helm claimed she hit the rock (milepost 58.2). Rather, while, according to Helm, she was in the right lane at milepost 58.2 when she hit the rock, the log indicates that the earlier rock was observed in the left lane of I-90 “around” milepost 58. Without any testimony to tie together the earlier rockslide to the current one, the danger of unfair prejudice and confusion of the issues was high.

Additionally, the log from the Washington State Patrol reflects entries by multiple individuals, who likewise reported statements from other people. Even though the log itself may satisfy an exception to hearsay as a certified public record, the trial court correctly ruled that the entries contained in the log must also satisfy a hearsay exception to be admissible. RP 271; ER 802, 805; *Coe*, 175 Wn.2d at 505 ¶ 53. The only exception Helm proffered was present sense impression, but, as the trial court noted, Helm failed to lay a foundation for the exception. RP 270-71; ER 803(a)(1).

Finally, even if Helm established the trial court’s decision was untenable, Helm did not show prejudice. An evidentiary error “is prejudicial if, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Coe*, 175 Wn.2d at 508 (internal quotations omitted). Helm has not, and cannot,

show that the admission of Trial Exhibit 15 would have materially affected the outcome of the trial. Moreover, the fact that rocks could fall on the road in this area was undisputed—that is why the Department had at least three warning signs posted as vehicles approached the Pass.

**D. The Trial Court Acted Within Its Discretion On Several Evidentiary And Jury Instruction Rulings, The Cumulative Effect Of Which Does Not Warrant A New Trial**

Acknowledging that none of the claimed errors discussed below would be independent grounds for reversal, Helm attempts to show that the cumulative effect of six specific “errors” mandates reversal under the cumulative error doctrine. As a preliminary matter, Helm cites to no case applying this doctrine outside of the criminal context. Regardless, as explained below, Helm establishes neither error, nor that the cumulative effect of any such errors denied her a fair trial. Four of the six alleged errors Helm discusses in this section (errors c-f in Appellant’s Brief) could have had no effect on the jury because they are relevant only to issues of proximate cause and damages. Since the jury found no negligence, it did not reach those questions. Helm has not met her burden to show that any trial court decision warrants reversal in this case.

**1. Trial Exhibit 13 Was Properly Excluded As Hearsay, Irrelevant, Cumulative, And Prejudicial**

Helm takes issue with the trial court’s evidentiary ruling to exclude Trial Exhibit 13, which is part of a report authored by Douglas McDonald,

former Secretary of the Department of Transportation, made to the Governor. RP 350-51.<sup>12</sup> The document describes the risks associated with rock slopes spanning 32 miles across I-90, and the remediation efforts on each. Trial Ex. 13. Helm argued the report should be admitted so that her witness, Tom Badger, could testify to the different types of protective measures that are used, and their effectiveness. RP 353.

The trial court aptly noted that Badger's testimony on the availability of protective devices would not be dependent on whether or not Trial Exhibit 13 was admitted. RP 353. The trial court also recognized the prejudice inherent in providing the jury with a document that describes risk for the entire Snoqualmie Pass area rather than the particular rock slope at issue in this case. RP 353. As the trial court stated, "to invite the jury to believe that because something was used on another slope it should have been used on this slope . . . I think confuses them and . . . prejudices the state." RP 355. The trial court's ruling was also premised on wanting to avoid wasting time (there was an incorrect picture that would have to be explained), raising collateral issues, and confusing the jury. RP 355. Admitting Trial Exhibit 13 would have also run afoul of previous rulings by the trial court that are unchallenged by Helm, including referencing rock fall events on other slopes in September and November of 2005. RP 358. The trial court was concerned that the

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<sup>12</sup> Badger and another individual were "technical authors" on the document who assisted Mr. McDonald on the final product. RP 351.

jury would be confused about the risk in other unrelated incidents in evaluating the risk in the present case. RP 359. However, the trial court did invite Helm to reintroduce the document later if she felt she established a sufficient basis for it. RP 360. Subsequently, Helm did not offer Trial Exhibit 13 through any witness' testimony. RP 360-743.

Helm was able to ask Mr. Badger questions about the availability and appropriateness of protective devices without having to reference Trial Exhibit 13. RP 384-89. Helm also used other exhibits through Badger's testimony to have him testify as to the risks and specific problems with Slope 1867.<sup>13</sup> RP 376-83. Thus, she was able to offer evidence on her stated purposes, and she did not need Trial Exhibit 13 admitted to do so.

Additionally, admitting Trial Exhibit 13 would have been contrary to the position Helm now asserts with respect to the Department's discretionary immunity defense. Helm adamantly claims that she never argued the Department's decision to defer slope remediation of 1867 was negligent. But the only legitimate reason that Trial Exhibit 13 would have been admitted would have been with respect to the reasoning behind the Department's decision to defer slope remediation. As Helm is claiming

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<sup>13</sup> Although Helm now claims that is a reason she offered Trial Exhibit 13, at trial, Helm only argued that Trial Exhibit 13 was relevant to the availability and use of protective measures. RP 353.

slope remediation deferral was irrelevant, she cannot also claim this document should have been admitted.

The trial court appropriately excluded Trial Exhibit 13. Not only is the document hearsay (to which Helm did not offer a viable exception),<sup>14</sup> irrelevant, prejudicial, and violative of earlier rulings regarding exclusion of evidence regarding other unrelated incidents, but it was also cumulative and unnecessary for the reason Helm claimed she needed the Trial Exhibit.

**2. Trial Exhibit 13 Was Unnecessary To Refresh Badger's Recollection On A Collateral Issue**

Ms. Helm did not offer Trial Exhibit 13 through Badger's testimony. However, she did try to use Trial Exhibit 13 to refresh Badger's recollection pursuant to ER 612, which provides in part:

If a witness uses a writing to refresh memory for the purpose of testifying, either: while testifying, or before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

ER 612. The general rule is that "allowing the use of notes to refresh the memory of a witness lies within the discretion of the trial court." *State v. Huelett*, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979). "The extent to which the witness may use such a memorandum is for the trial judge in his

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<sup>14</sup> Helm's only response was that she "thought" Trial Exhibit 13 was a public record, but the hearsay exception for public records requires certified copies. RP 350; RCW 5.44.040

discretion to determine, and his ruling will not be disturbed unless there has been an abuse of such discretion.” *Huelett*, 92 Wn.2d at 969 (citing 2 C. Torcia, *Wharton’s Criminal Evidence* § 415 (13th ed. 1972)). Helm can only prevail on appeal on this issue if “no reasonable person would take the view adopted by the trial court.” *Huelett*, 92 Wn.2d at 969 (citing *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977)).

Here, the underlying question that Helm wanted to ask Badger was, “do you remember whether or not the Slope 1867 in what area or section the -- as you broke down the I-90 corridor, which section that was in?” RP 372-73. Because Badger could not remember the specific section, Helm purportedly wanted to refresh his recollection with Trial Exhibit 13. RP 372-73. The State’s earlier objection, which it repeated in response to this question, was relevance. RP 372-73. Simply put, there was no reason for Badger to have to refresh his memory on the question, because the underlying question was immaterial. It made no difference in this lawsuit what specific section of I-90 Slope 1867 was contained in. Helm did not need to refresh Mr. Badger’s recollection on a collateral fact.

**3. The Jury Did Not Address Causation or Damages, So The Court Need Not Address Rulings Limiting Lay Witness Testimony on Helm’s Physical Condition**

Helm next asserts the trial court abused its discretion by sustaining objections to Helm’s questions to her neighbor, Jo Sohneronne, regarding

Helm's physical condition prior to and after the accident. However, the jury never reached the questions of causation or damages, so this Court need not review this issue. CP 133.

Regardless, the trial court did not abuse its discretion in asking Helm to rephrase her questions to avoid conclusory statements about Helm's conditions. And, prior to and after the rulings that Helm appeals, Sohneronne testified fully about observing Helm gardening, mowing, weeding, digging, playing with the kids, and walking the dog prior to the accident, and Helm's observable limitations after the accident. RP 462-67. The point that Helm's physical condition had changed as a result of the accident had been made. The trial court did not abuse its discretion in requiring Helm to rephrase a few specific questions, which, in any event, could not have affected the outcome of the case where the jury did not reach issues of causation or damages.

**4. Pictures Of Helm's Family Were Relevant Only To Damages, and Properly Excluded As Cumulative**

Similarly, this Court need not reach Helm's appeal of the trial court's decision to exclude pictures of Helm's family on vacation (Trial Exs. 24, 26, and 27), which were proffered exclusively on the issue of damages. Since the jury found no liability, any error in excluding damages evidence is necessarily harmless. In any event, the trial court appropriately exercised its discretion, particularly where: (1) it had

already admitted Trial Exhibit 25, a picture depicting Helm's husband, son, and a friend on vacation in the summer of 2006, (2) the pictures did not depict Helm, (3) the issue of whether Helm hiked and vacationed prior to the accident was not contested, and (4) Helm did not offer Trial Exhibits 24 or 26. CP 488-90. Moreover, Helm, her husband, her father, her mother, her son, and even her neighbor were all permitted to testify to the activities that Helm used to participate in prior to the accident, so the pictures were cumulative. RP 165-67 (Helm), 462-67 (neighbor), 469-74 (father), 480-90, 495-96 (husband), 604-07 (son), 610-19 (mother). Helm has not shown prejudice or abuse of discretion.

**5. The Jury Never Reached The Question Of Contributory Fault, And The Court's Instruction Was Proper**

As with the above two challenges, the Court should also disregard Helm's appeal of the trial court's decision to instruct the jury on contributory fault because the jury never reached that question. In any event, there was sufficient evidence from which the jury could have found Helm to have breached her duty to exercise reasonable care in driving her car over Snoqualmie Pass, particularly where Helm had a 900 foot sight distance from which she could have seen and avoided the rock before hitting it. RP 379. While the evidence suggests that the rock fall could have occurred four minutes prior to Helm's accident, Helm testified that she did not see the rock right away, but rather saw something "moving in

the road.” RP 131, 379. There was also evidence of a number of other possible distractions, including that she failed to notice at least three yellow warning signs for rocks at several points going westbound, that there was music playing in her motorhome, that her son was looking for new music to play in the front seat, or that Helm’s daughter and three dogs were also in the vehicle. RP 130, 170, 294-95, 192-93, 603.

The jury could have reasonably concluded that Helm was not paying adequate attention in the minutes preceding her accident. The trial court did not abuse its discretion.

**6. The Jury Never Reached The Question Of Superseding Cause, And The Court’s Instruction Was Proper**

Helm claims the trial court abused its discretion in giving the standard instruction on superseding cause based on the facts of this case. Br. of Appellant at 45-47. Again, however, Helm points to an issue that the jury never reached. CP 133.

The question of whether an intervening event, including the negligent act of the plaintiff or a third party, is a superseding cause (and, accordingly, not foreseeable to defendant) is generally a question of fact for the jury. *Cramer v. Dep’t of Highways*, 73 Wn. App. 516, 521, 870 P.2d 999 (1994) (“A superseding cause exists if the acts *of the plaintiff or a third party*. . . .”) (emphasis added); *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 397, 558 P.2d 811 (1976). The trial court gave the instruction

on superseding cause based on two possible premises. First, the trial court recognized that a plaintiff's contributory negligence, where not reasonably anticipated, can be a superseding cause. RP 509-10. *See also Cramer*, 73 Wn. App. at 521 (recognizing acts of plaintiff may be superseding cause). Second, the trial court took note that Helm's herniated disk could have been caused by an event independent of her accident. RP 655. The Department's medical expert, Dr. McLaughlin, opined that, based on how long Helm waited after the accident to seek treatment and have surgery, the accident did not cause the herniated disk, because typically, that kind of event would send someone into the emergency room on the date of the injury. RP 449-551, 596-97.

The New Mexico Court of Appeals case cited by Helm is not on point or persuasive. In *Chamberland v. Roswell Osteopathic Clinic*, 27 P.3d 1019 (N.M. Ct. App. 2001), the entire issue was whether the medical professionals were negligent in not detecting plaintiff's appendicitis, so a superseding cause instruction was not appropriate. *Chamberland*, 27 P.3d at 1021. The present case is not a medical malpractice case. Helm does not argue the Department should have detected her degenerative disk disease. Rather, the question was whether Helm's injuries were caused by the Department's alleged negligence or by some other intervening event.

The trial court properly exercised its discretion in giving Instruction Number 12, and, in any event, the jury did not reach the question of proximate cause.

**V. CONCLUSION**

Helm has not established an abuse of discretion warranting a new trial. This Court should affirm the rulings and judgment of the trial court.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of December 2013.

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Assistant Attorneys General  
Attorneys for Respondents

## INSTRUCTION NO. 27

The system for managing slopes along roadways involves a basic governmental policy of the Department of Transportation.

The prioritization was essential to determining how to mitigate dangers with limited resources.

The prioritization involved the exercise of policy-level judgment.

The Department of Transportation has the authority to make this type of decision.

The State of Washington is immune from liability for decisions in which it is determining basic governmental policy.

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FILED  
SUPERIOR COURT  
THURSTON COUNTY, WA

IN THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR THURSTON COUNTY

2013 MAR 19 PM 3:55

BETTY J. GOULD, CLERK

Tracy Helm,	)	
	)	
Plaintiff,	)	No. 09-2-02582-4
	)	
vs.	)	VERDICT FORM
	)	
	)	
State of Washington, Department of	)	
Transportation,	)	
Defendant.	)	

We, the jury, answer the questions submitted by the court as follows:

**QUESTION 1:** Does the evidence establish that the Department of Transportation balanced the risks and advantages of delaying remediation of slope 1867?  
**ANSWER:** (Write "yes" or "no") YES

*(DIRECTION: If you answered "yes" to this question then answer Question 2. If you answered "no" to this question then answer Question 2A.)*

**QUESTION 2:** Apart from its decisions regarding slope remediation, was the State of Washington negligent in this case?  
**ANSWER:**  
**ANSWER:** (Write "yes" or "no") NO

*(DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)*

**QUESTION 2A:** Was the defendant negligent?  
**ANSWER:** (Write "yes" or "no") \_\_\_\_\_

*(DIRECTION: If you answered "no" to Question 1, sign this verdict form. If you answered "yes" to Question 1, answer Question 2.)*

**QUESTION 3:** Was the defendant's negligence a proximate cause of injury to the plaintiff?  
**ANSWER:** (Write "yes" or "no") \_\_\_\_\_

*(DIRECTION: If you answered "no" to Question 2, sign this verdict form. If you answered "yes" to Question 2, answer Question 4.)*

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**QUESTION 4:** What do you find to be the plaintiff's amount of damages? Do not consider the issue of contributory negligence, if any, in your answer.  
**ANSWER:** \$

*(DIRECTION: If you answered Question 4 with any amount of money, answer Question 5. If you found no damages in Question 4, sign this verdict form.)*

**QUESTION 5:** Was the plaintiff also negligent?  
**ANSWER:** (Write "yes" or "no") \_\_\_\_\_

*(DIRECTION: If you answered "no" to Question 5, sign this verdict form. If you answered "yes" to Question 5, answer Question 6.)*

**QUESTION 6:** Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?  
**ANSWER:** (Write "yes" or "no") \_\_\_\_\_

*(DIRECTION: If you answered "no" to Question 6, sign this verdict form. If you answered "yes" to Question 6, answer Question 7.)*

**QUESTION 7:** Assume that 100% represents the total combined fault that proximately caused the plaintiff's injury and damage. What percentage of this 100% is attributable to the defendant's negligence, and what percentage of this 100% is attributable to the negligence of the plaintiff? Your total must equal 100%.

**ANSWER:**  
To defendant Department of Transportation: \_\_\_\_\_ %  
To plaintiff Tracy Helm: \_\_\_\_\_ %  
**TOTAL:** 100%

*(DIRECTION: Sign this verdict form and notify the bailiff.)*

**DATE:** 2-19-13  
Presiding Juror

JOHN PORTER  


0-000000134

NO. 44715-1-II

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

TRACY HELM,

Appellant,

v.

STATE OF WASHINGTON, et al.,

Respondents.

NO. 44715-1-II

(Thurston County Cause  
No. 09-2-02582-4)

PROOF OF SERVICE

I, Amanda Trittin, hereby certify that on December 2, 2013, I caused to be postmarked and sent for service a copy of the RESPONDENTS' BRIEF on the attorney for Appellant, as set forth below:

Attorney for Plaintiff:

Jack W. Hanemann  
2120 State Ave NE Ste 101  
Olympia, WA 98506

- United States Mail
- Hand Delivered by Legal Messenger
- UPS Overnight Mail
- Email

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of December, 2013, at Olympia, WA.

  
 AMANDA TRITTIN

FILED  
 COURT OF APPEALS  
 DIVISION II  
 2013 DEC -3 AM 11:55  
 STATE OF WASHINGTON  
 DEPUTY